ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of	
POLICY AND RULES CONCERNING THE INTERSTATE, INTEREXCHANGE MARKETPLACE	CC Docket No. 96-61
IMPLEMENTATION OF SECTION 254(g) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED	

REPLY COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

TELECOMMUNICATIONS
RESELLERS ASSOCIATION

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SUMMARY

The Telecommunications Resellers Association ("TRA"), an organization consisting of more than 450 resale carriers and their underlying product and service suppliers, offers the following reply comments in response to the second phase submissions of other commenters in the captioned rulemaking proceeding:

- The Commission's proposal to prohibit non-dominant IXCs from filing tariffs for their domestic service offerings has been met with strong resistance on virtually all fronts. Commenters oppose a bar on the filing of domestic tariffs by non-dominant IXCs for a variety of reasons ranging from safeguarding consumer interests to avoiding the imposition of undue administrative and cost burdens on IXCs to concerns regarding adverse impacts on competition.

- Unlike many other carrier commenters, TRA has opposed, and continues to oppose, permissive, as well as mandatory, detariffing. Merely making detariffing permissive rather than mandatory fails to remedy the primary adverse impact to which detariffing would subject the resale community, and its current and prospective residential and small business customers -- *i.e.,* the effective "gutting" of the Commission's pro-competitive resale, "general availability" and non-discrimination policies. Indeed, permissive detariffing would potentially create the worst of all worlds for resale carriers. Underlying carriers could refrain from filing as tariffs the highly attractive offerings they make available to large corporate users, thereby denying resale carriers the opportunity to avail themselves of these preferred services and price points, while at the same time filing as tariffs their service arrangements with resale carriers, thereby reserving to themselves the right, at least potentially, to unilaterally modify these arrangements through tariff revisions. Moreover, given that it is by no means certain that voluntarily-filed tariffs would have the same "force of law" as statutorily-mandated tariffs, it is not at all clear that permissive detariffing would relieve carriers of the administrative burdens that would arise in the absence of filed tariffs. Finally, unless at least the major carriers are required to list in tariffs all of their service offerings and associated rates and charges, tariffs would not serve a meaningful informational role for residential and small and mid-sized commercial users.

- In its comments, TRA recommended that the Commission strengthen the "substantial cause" test to prohibit unilateral changes in long-term service arrangements in all but the most extreme circumstances and, in those extreme circumstances, to afford customers of long-term service arrangements which have been unilaterally altered a "fresh-look" opportunity to terminate the arrangement

without liability. Consistent with this recommendation, TRA also urged the Commission to apply the Mobile-Sierra doctrine to all carrier-to-carrier service arrangements irrespective of the form or context in which such arrangements are embodied and in so doing to prohibit unilateral modification of carrier-to-carrier arrangements, including arrangements between resale carriers and their network providers, through tariff revisions. To address concerns voiced by large corporate users herein, TRA would expand its previous recommendations to incorporate the proposal that the Commission declare unjust and unreasonable and hence, unlawful and unenforceable any tariff revision which effects a unilateral modification to an existing long-term service arrangement. Under this expanded approach, carriers would be permitted to modify their extended-term service offerings only so long as they "grandfathered" all existing customers, including those that had ordered, but not yet received, service, for the full term of their current service arrangements.

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COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.1415, hereby replies to the second phase comments submitted by other parties in response to the Notice of Proposed Rulemaking, FCC 96-123, released by the Commission in the captioned docket on March 25, 1996 (the "Notice"). In the second phase of the proceeding, the Commission sought comment on, among other things, (i) the adoption of a mandatory detariffing policy for the domestic service offerings of non-dominant interexchange carriers ("IXCs"); and (ii) a variety of tariff-related matters, including the application of the "substantial cause" test and the Mobile-Sierra doctrine,[1] the availability of "fresh-look" opportunities, appropriate notice periods for tariff

[1] United Gas Co. v. Mobile Gas Corp., 350 U.S. 332, 339 (1956); Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 (1956).

revisions, and the lawfulness of terms and conditions of service and other carrier practices which have the practical effect of rendering service offerings unavailable for resale.

I.

INTRODUCTION

In its second phase comments, TRA, on behalf of its more than 450 resale carrier and supplier members, urged the Commission to retain tariff filing requirements for the domestic service offerings of non-dominant IXCs, but to modify its current tariffing policies to better reflect the "substantially competitive" interstate, interexchange telecommunication market. To this end, TRA recommended that the Commission adopt a "bifurcated" tariffing scheme for domestic non-dominant carriers which would substantially relax tariffing requirements for all but those few carriers that retain the ability to thwart the Commission's pro-competitive resale and other policies or to otherwise engage in unreasonable discrimination. Specifically, TRA proposed that with the exception of those carriers that are affiliated with incumbent local exchange carriers ("LECs"), IXCs which generate less than five percent of aggregate domestic interstate toll revenues should be permitted, but not required, to replace the detailed rate schedules the Commission currently mandates must be included in their domestic tariffs with "maximum" or "reasonable ranges" of rates and to file all tariffs and tariff revisions on a single day's notice. Only those IXCs that generate five percent or more of aggregate domestic interstate toll revenues or which are affiliated with an incumbent LEC, would, under TRA's approach, be required to include detailed price schedules in their domestic tariffs and to provide fourteen days' notice of tariff revisions that impact long-term service arrangements.

With respect to the other tariff-related issues raised in the Notice, TRA urged the Commission to strengthen the "substantial cause" test so as to prohibit unilateral changes in long-term service arrangements in all but the most extreme circumstances and, in those extreme circumstances, to afford customers of long-term service arrangements which have been unilaterally altered a "fresh-look" opportunity to terminate the arrangement without liability. Consistent with this recommendation, TRA further urged the Commission to apply the Mobile-Sierra doctrine to all carrier-to-carrier service arrangements irrespective of the form or context in which such arrangements are embodied and in so doing to prohibit unilateral modification of carrier-to-carrier arrangements, including arrangements between resale carriers and their network providers, through tariff revisions. Finally, TRA urged the Commission to declare unlawful tariff provisions and carrier practices which although not expressly restrictive of resale, nonetheless have the practical effect of rendering service offerings unavailable for resale.

TRA emphasized in its second-phase comments that the '96 Act permits the Commission to forebear from applying regulations and/or statutory provisions only if it first determines that enforcement of the requirements embodied therein is no longer necessary either to ensure the just, reasonable and nondiscriminatory provision of service or to protect consumers.[2] Moreover, TRA stressed, the '96 Act requires the Commission to predicate any act of forbearance upon a finding that such forbearance would further the public interest.[3] As acknowledged by the Notice (at ¶ 17), the '96 Act further requires the Commission in exercising its newly-granted forbearance authority to determine "whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers

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[2] Pub. L. No. 104-104, 110 Stat. 56, § 401(a) (1996).

[3] Id.

of telecommunications services."[4] And as further acknowledged by the Notice (at ¶¶ 1, 4), the '96 Act not only provides for a "pro-competitive" as well as a "de-regulatory" national policy framework,[5] but recognizes that competition would be furthered by reducing or eliminating only those regulations "which may no longer be in the public interest."

II.

ARGUMENT

A. Opposition To A Mandatory Detariffing Policy For The Domestic Offerings Of Non-dominant Interexchange Carriers Has Been Overwhelming

The Commission's proposal to prohibit non-dominant IXCs from filing tariffs for their domestic service offerings has been met with strong resistance on virtually all fronts. The carrier community, including the overwhelming majority of IXC commenters,[6] a number of LEC commenters,[7] and competitive access provider ("CAP") and competitive local exchange carrier ("CLEC") commenters,[8] is almost unanimous in its opposition to the mandatory detariffing policy

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[4] Id. at § 401(b).

[5] S. Conf. Rep. No. 203, 104th Cong., 2nd Sess., p. 1 (1996) ("Joint Explanatory Statement").

[6] Opponents include the largest carriers (*e.g.*, MCI Telecommunications Corporation ("MCI"), AT&T Corp. ("AT&T"), Sprint Corporation ("Sprint") and WorldCom, Inc. d/b/a LDDS WorldCom ("WorldCom")), other facilities-based providers (*e.g.*, LCI International Telecom Corp. ("LCI"), Cable & Wireless, Inc. ("C&W"), Frontier Corporation ("Frontier"), and Eastern Telephone Systems, Inc. d/b/a Eastern Tel Long Distance Service, Inc. ("Eastern Tel")), resale carriers (*e.g.*, Excel Telecommunications, Inc. ("Excel"), Ursus Telecom Corp. ("UTC"), Business Telecom, Inc. ("BTI"), and General Communication, Inc. ("GCI")) and trade associations and other groups representing IXCs (*e.g.*, Competitive Telecommunications Association ("CompTel"), America's Carriers Telecommunications Association ("ACTA") and the Casual Calling Coalition).

[7] *See, e.g.*, Ameritech, Pacific Telesis Group ("PacTel"), U S West, Inc. ("U S West"), and GTE Service Corporation, *et al.* ("GTE").

[8] *See, e.g.*, MFS Communications Company, Inc. ("MFS"), Winstar Communications, Inc. ("Winstar").

proposed in the Notice. The States, including regulatory authorities and attorneys general, are equally adamant in their opposition.[9] And consumer groups and other representatives of residential and small business users have all registered their opposition as well.[10] Even some of the large corporate users, who are likely to be the only net beneficiaries of a mandatory detariffing policy, have attempted to limit their support for mandatory detariffing in an effort to minimize adverse impacts on other consumer groups and industry segments.[11] In short, the commenters which have signalled their support for a mandatory detariffing policy are few and far between.

The commenters referenced above oppose a bar on the filing of domestic tariffs by non-dominant IXCs for a variety of reasons ranging from safeguarding consumer interests to avoiding the imposition of undue administrative and cost burdens on IXCs to concerns regarding adverse impacts on competition. Consumer groups and other representatives of residential and small business users stress the importance of tariffs as a source of information regarding telecommunications service offerings and prices and as a safeguard against discriminatory treatment of lower volume users. As described by the Consumer Federation, "[w]hat might be a reasonable policy for a class of customers that negotiate contracts for interexchange service is

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[9] *See, e.g.,* Consumer Advocate Division of the Office of the Tennessee Attorney General ("Tennessee"), the State of Alaska ("Alaska"), the Louisiana Public Service Commission ("LPSC"), and the Pennsylvania Public Utility Commission ("PaPUC").

[10] *See, e.g.,* Consumer Federation of America and Consumers Union ("Consumer Federation"), Office of the Ohio Consumers' Counsel ("Ohio Consumers' Counsel"), Telecommunications Research and Action Center ("TRAC"), and The National Association of Development Organizations, Paraquad, United Homeowners Association, National Hispanic Council on the Aging, Consumers First and National Association of Commissions for Women (collectively, "NADO").

[11] *See, e.g.,* Ad Hoc Telecommunications Users Committee ("Ad Hoc"), UTC, The Telecommunications Association ("UTC"), and Capital Cities/ABC, Inc., CBS, Inc., National Broadcasting Company, Inc. and Turner Broadcasting System, Inc. (the "Broadcast Interests").

contrary to the public interest for the residential and small business consumer and therefore is inconsistent with the law."[12] The Ohio Consumers' Counsel adds that "tariff filing is necessary to prevent unjustly and unreasonably discriminatory rates . . . [and] for the protection of consumers."[13] And as eloquently described by TRAC:

> The Commission has mistakenly determined that it is pro-competitive to make it difficult for consumers to learn the cost of long distance telephone service . . . It is a fundamental principal that a competitive, consumer driven market depends upon consumer decisions based on "known market prices." . . . The goal of the Commission should be to promote a market place that empowers most consumers to make informed decisions about which long distance service to purchase based on the actual prices available to them. . . . Perhaps the best evidence of market failure in terms of informed consumer decision making is the fact that most interexchange long distance consumers continue NOT to be on a discounted long distance calling plan.[14]

The States express similar concerns regarding the Commission's detariffing proposals. Thus the PaPUC declares that "[t]ariffs are the only effective way that state commissions and consumer advocates' offices can monitor interstate prices and evaluate interstate, interexchange markets."[15] For its part, the LPSC advises that "[i]f tariffs are no longer mandated, State commissions will not be able to readily protect the consumers as the commissions have been able to do in the past;" indeed, the LPSC refers to tariff filing requirements as "one of the greatest consumer protection devices," necessary to keep carriers "honest."[16] Echoing these

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[12] Consumer Federation Comments at 2.

[13] Ohio Consumers' Counsel Comments at 6.

[14] TRAC Counsel Comments at 3-4.

[15] PaPUC Comments at 8.

[16] LPSC Comments at 5.

concerns, the State of Alaska scolds the Commission for seemingly proposing to abdicate its regulatory responsibilities:

> [T]he Telecommunications Act makes more clear than ever that the [FCC] is tasked with the responsibility of assuring that telecommunications services are provided to these Americans in a manner that complies with statutory requirements. The Commission should not leave the responsibility to others. The residents of rural Alaska, for example, lack the resources and information necessary to enforce their statutory rights to just, reasonable, nondiscriminatory and affordable rates . . . Congress has tasked the Commission with the responsibility of enforcing telecommunications laws and assuring that rates are just, reasonable, nondiscriminatory and affordable. Adherence to the statutory requirement of tariff filing is an appropriate way of fulfilling that responsibility.[17]

IXCs express grave concerns regarding not only the massive new administrative and cost burdens that would be imposed on them in a detariffed environment, but the impact of detariffing on their ability to continue to fully serve their customers. WorldCom capsulizes a number of these concerns as follows:

> [T]he proposed policy would not be in the public interest because it would make it far more difficult for many types of consumers, including residential consumers, small business customers, and so-called "casual callers," to have simple, easy, and inexpensive access to long distance service. In many cases, a federal tariff is the only practical means of establishing a legal relationship with those customers who, for a variety of reasons, would choose not to take the time and expense to negotiate and sign a contract with an IXC. Without the ability to rely on a federal tariff, all IXCs would face increased expenses to establish, police, and enforce a multitude of contractual arrangements with each and every consumer. These substantial new administrative costs would be felt by the consumer, with the end result of higher prices, less efficient providers, and, in some cases, a reduction or withdrawal of service to transient and low-volume usage customers.[18]

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[17] Alaska Comments at 4.

[18] WorldCom Comments at ii.

Emphasizing the administrative burdens, LCI notes that:

> [M]any IXCs have in effect hundreds if not thousands of individual contracts that reference terms, conditions and other information in their tariffs. Mandatory detariffing would force these carriers to redraft -- and perhaps, renegotiate -- all of these outstanding contracts. The cost of such a project, in terms of the commitment of marketing resources and legal expense, would be enormous. Further, even those costs could be dwarfed by the marketing and legal expense involved in converting to individual contracts the existing customers that currently take service exclusively through tariffs.[19]

Sprint emphasizes that in a detariffed environment residential and small business users likely would be afforded less convenient network access, assessed additional charges and provided with fewer services.[20] As AT&T bluntly states: "The simple fact is that consumers and carriers would face substantial additional costs and dislocation if nondominant carriers were forbidden to file tariffs.[21]

In short, mandatory detariffing is a bad idea. Unfortunately, permissive detariffing is just as ill-advised.

B. Permissive Detariffing Creates The Worst Of All Worlds Worlds For Resale Carriers And Their Residential And Small Business Customers

As noted earlier, TRA, unlike many other carrier commenters, has opposed, and continues to oppose, permissive, as well as mandatory, detariffing. Unfortunately, merely making detariffing permissive rather than mandatory fails to remedy the primary adverse impact to which detariffing would subject the resale community, and its current and prospective residential and

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[19] LCI Comments at 3.

[20] Sprint Comments at 10-19.

[21] AT&T Comments at 16.

small business customers -- *i.e.,* the effective "gutting" of the Commission's pro-competitive resale, "general availability" and non-discrimination policies. Indeed, permissive detariffing would potentially create the worst of all worlds for resale carriers. Underlying carriers could refrain from filing as tariffs the highly attractive offerings they make available to large corporate users, thereby denying resale carriers the opportunity to avail themselves of these preferred services and price points, while at the same time filing as tariffs their service arrangements with resale carriers, thereby reserving to themselves the right, at least potentially, to unilaterally modify these arrangements through tariff revisions. Moreover, given that it is by no means certain that voluntarily-filed tariffs would have the same "force of law" as statutorily-mandated tariffs, it is not at all clear that permissive detariffing would relieve carriers of the administrative burdens that would arise in the absence of filed tariffs. Finally, unless at least the major carriers are required to list in tariffs all of their service offerings and associated rates and charges, tariffs would not serve a meaningful informational role for residential and small and mid-sized commercial users.

As noted above, the primary objection of TRA and its resale carrier members to permissive detariffing is that such a regulatory regime would allow the major network providers to effectively avoid their obligation to make their services available to resale carriers on a non-discriminatory basis. In its comments, TRA explained that the relationship between resale carriers and their underlying network providers is generally an awkward one, given that resale carriers are not just large customers, but aggressive competitors, of their network providers. While resale carriers, like large corporate and other major users of telecommunications services, do serve as a very substantial revenue source for their network providers, they use whatever "price breaks" they secure as a result to compete for the small and mid-sized accounts that would

otherwise provide the network providers with their highest "margins." Accordingly, network providers, particularly the largest carriers which stand to lose the greatest percentage of customers to small, aggressive competitors, have every incentive to deny to resale carriers the rates and services they provide to large corporate users with comparable (and often significantly lower) traffic volumes.

To address this obvious problem, the Commission has undertaken a number of pro-competitive actions. First, the Commission has required "all common carriers . . . to permit unlimited resale of their services;"[22] indeed, the Commission deems any "[a]ctions taken by a carrier that effectively obstruct the Commission's resale requirements . . . [to be] inherently suspect."[23] Second, the Commission has required carriers to make customer specific service arrangements "generally available" to all "similarly-situated customers"[24] and has indicated that it will "scrutinize closely any restrictive eligibility requirements to ensure that they are not

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[22] AT&T Communications: Apparent Liability for Forfeiture and Order to Show Cause, 10 FCC Rcd. 1664, ¶2 (1995), *pet. for rev. pending* AT&T Corp. v. FCC, Case No. 95-1339 (filed July 5, 1995) ("AT&T Forfeiture Order") (*citing* Resale and Shared Use of Common Carrier Services, 60 F.C.C.2d 261 (1976) ("Resale and Shared Use Order"), *recon.* 62 F.C.C.2d 588 (1977), *aff'd sub nom.* American Tel. & Tel. Co. v. FCC, 572 F.2d 17 (2d Cir.), *cert. denied,* 439 U.S. 875 (1978); Resale and Shared Use of Common Carrier Services, 83 F.C.C.2d 167 (1980), *recon.* 86 F.C.C.2d 820 (1981)); *see also* U S West Tariff Nos. 3 and 5, 10 FCC Rcd. 13708, ¶11 (1995) (*citing* the Resale and Shared Use Order and the AT&T Forfeiture Order).

[23] AT&T Forfeiture Order, 10 FCC Rcd. 1664 at ¶13.

[24] Competition in the Interstate, Interexchange Marketplace, 6 FCC Rcd. 5880, ¶¶ 112, 115 (1991) ("First Interexchange Competition Order"), 6 FCC Rcd. 7255 (1991), 6 FCC Rcd. 7569 (1991), 7 FCC Rcd. 2677 (1992), *recon.* 8 FCC Rcd. 2659 (1993), 8 FCC Rcd. 3668 (1993) ("Second Interexchange Competition Order"), 8 FCC Rcd. 5046 (1993), *recon.* 10 FCC Rcd 4562 (1995) ("1995 Interexchange Reconsideration Order") (collectively, the "Interexchange Competition" proceeding); AT&T Communications, Revisions to Tariff F.C.C. No. 12, 4 FCC Rcd. 4932, 4938-39 (1989) ("Tariff 12 Order"), *recon.* 4 FCC Rcd. 7928 (1989) ("Tariff 12 Reconsideration Order"), *remanded* MCI Telecommunications Corp. v. FCC, 917 F.2d 30 (D.C.Cir. 1990), *on remand* 6 FCC Rcd. 7039, 7050-52 (1991) ("Tariff 12 Remand Order").

pretexts for unreasonably discriminating among customers."[25] Finally, the Commission has been able to enforce these requirements through its tariff review process and by exercising its enforcement authority in addressing complaints filed by resale carriers that have been unlawfully denied service. And while enforcement of the Commission's resale requirements has not been as aggressive and as consistent as it should given the level of abuses in the interstate, interexchange market, network providers have nonetheless been sanctioned for hindering resale of their services.[26]

The linchpin of the Commission's enforcement efforts, however, has been the tariffs filed by the major network providers. As the U.S. Supreme Court has recognized, "[w]ithout [tariffs] . . . it would be monumentally difficult to enforce the requirement that rates be reasonable and nondiscriminatory . . . and virtually impossible for the public to assert its right to challenge the lawfulness of existing proposed rates."[27] And as the Commission itself has acknowledged, the only way to ensure that "contract carriage [does not] have an adverse effect on resellers" is to require that "the terms of [the] contracts must be filed with the Commission and made available to all similarly situated customers."[28] Indeed, in concluding that its "contract carriage policy [was] consistent with the § 202(a) nondiscrimination provisions of the Act," the Commission relied heavily on the conclusion of the U.S. Court of Appeals for the District of

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[25] Tariff 12 Order, 4 FCC Rcd. 4932 at ¶ 64.

[26] *See, e.g.,* Public Service Enterprises of Pennsylvania, Inc. v. AT&T Corp., 10 FCC Rcd. 8390, ¶¶ 12, 17, 19 (1995), *pet. for rev.* Cia. No. 95-1339 (D.C.Cir. July 5, 1995); AT&T Forfeiture Order, 10 FCC Rcd. 1664 at ¶ 10; AT&T Communications Contract Tariff No. 360, Transmittal No. CT 3076, CC Docket No. 95-80, DA 95-1244 (released June 5, 1995); AT&T Communications Contract Tariff No. 374, Transmittal Nos. 2952 and 3441, DA 95-1061 (released May 10, 1995).

[27] Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 at 132 (*quoting* Regular Common Carrier Conference v. U.S., 793 F.2d 376 at 379).

[28] First Interexchange Competition Order, 6 FCC Rcd. 5880 at ¶ 115.

Columbia Circuit that "rates arrived at through negotiations between a carrier and an individual customer and then made generally available to other similarly situated customers do not *per se* violate the Communications Act if the rates are filed with the Commission."[29]

In contemplating any form of detariffing -- mandatory or permissive -- the Commission must address how its resale policies will be realized in the absence of filed tariffs -- *i.e.,* how without benefit of publicly-filed tariffs resale carriers will obtain non-discriminatory access to the service offerings and price points made available to corporate users with equal or lesser traffic volumes. As TRA emphasized in its comments, it is difficult enough today for resale carriers to identify, and actually secure, from among the many contract tariff arrangements on file with the Commission "off-the-shelf" service offerings which as a practical matter can be viably resold.[30] Without publicly-filed tariffs, this task would be insurmountable. How, without tariffs, will resale carriers be able to determine what services and rates are being made available to entities which generate comparable traffic volumes, but which are not competitors, much less obtain these offerings? And how will the Commission be able to enforce its resale, "general availability" and non-discrimination policies if it has no reference points or benchmarks?

Detariffing -- permissive, as well as mandatory -- effectively negates the Commission's resale, "general availability" and non-discrimination policies. A requirement that cannot be enforced is no longer a requirement; it is at best a suggestion. If the Commission is to take such a drastic turn in direction, it should do so publicly and following notice and comment proceedings, not indirectly without acknowledging its intent or the full ramifications of its actions. "A notice of proposed rule-making is legally inadequate if it does not 'adequately

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[29] Id at ¶ 115 (*quoting* MCI Telecommunications Corp. v. FCC, 917 F.2d 30, 38 (D.C.Cir. 1990)).

[30] *See, e.g.,* footnote 26, supra.

frame the subjects for discussion'" or if it "fails to adequately describe the effect of the proposed [action]."[31] "Notice which fails to alert the public to significant policy changes violates the APA's notice and comment provisions."[32]

As TRA noted in its comments, the bulk of its resale carrier members are small to mid-sized businesses serving other small to mid-sized businesses. Congress is currently looking to small business to create jobs and stimulate economic growth; indeed, Section 257 of the '96 Act provides for Commission identification and elimination of "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services or in the provision of parts or services to providers of telecommunications services and information services."[33] In its recently released Notice of Inquiry commencing its "omnibus Section 257 proceeding," the Commission noted the "significant role" played by small business in the U.S. economy, but acknowledged that "small businesses currently constitute only a small portion of telecommunications companies."[34] In light of the clear Congressional directive to facilitate greater participation by small business in telecommunications, TRA submits that it would make little sense to adopt policies which would have a material adverse impact on the small and mid-sized companies that populate the resale

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[31] Citibank, Federal Savings Bank v. FDIC, 836 F. Supp. 3 (D.D.C. 1993) (*quoting* Connecticut Light and Power Co. v. NRC, 673 F.2d 525, 533 (D.C.Cir. 1982)).

[32] Id, 836 F. Supp. 3 (*quoting* Natural Resources Defense Counsel, Inc. v. Hodel, 618 F.Supp. 848 (E.D. 1985)).

[33] 47 U.S.C. § 257.

[34] Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Business (Notice of Inquiry), GN Docket No. 96-113, FCC No. 96-216, ¶ 6 (released May 21, 1996). Obviously, it makes little sense to deplete the ranks of one of the few segments of the telecommunications industry in which small businesses have thrived while at the same time conducting proceedings to eliminate barriers to small business market entry.

industry.[35] As the Commission has acknowledged, it will be small businesses that will serve the "narrower niche markets that may not be easily or profitably served by large corporations, especially as large telecommunications [corporations] expand globally."[36]

Exacerbating this problem, permissive detariffing places resale carriers between the proverbial "rock and a hard place." As noted above, permissive detariffing actually creates for resale carriers a worse situation with respect to the concerns identified in the preceding section than would mandatory detariffing. In a permissive detariffing regime, a network provider can deny resale carriers access to service offerings and price points to which they would be legally entitled simply by not including those service arrangements in publicly-filed tariffs; a resale carrier cannot obtain a service arrangement of which it has no knowledge. Nonetheless, a network provider can preserve its ability to unilaterally modify a resale carrier's service arrangement by including it in a publicly-filed tariff and exercising its statutory right to initiate tariff changes. Obviously, it is not an answer to require network providers to maintain at their premises all service arrangements they make available to their customers. Given the unlawful denials of service that have occurred even with the benefit of publicly-filed tariffs, does anyone truly believe that merely directing network providers to disclose all service and price offerings to resale carriers would be an effective means of ensuring that competitors are provided non-discriminatory access to preferred service offerings and price points?

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[35] Such an approach would appear to be particularly ill-timed given the emphasis that the U.S. Congress has put on resale as a vehicle to promptly bring competition into the local telecommunications market. 47 U.S.C. § § 251(b)(1), 251(c)(4).

[36] Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Business (Notice of Inquiry), GN Docket No. 96-113, FCC No. 96-216 at ¶ 6.

Rendering permissive detariffing all the more problematic is the unknown impact of voluntary filing on the legal status of tariffs. The "force of law" accorded tariffs is generally said to flow from the fact that tariffs are mandated by statute. Section 203 of the Communications Act of 1934, as amended, not only requires carriers to file tariffs, but prohibits them from deviating from those published tariffs.[37] As the Commission emphasized in rejecting claims that the "filed rate doctrine" did not apply to non-dominant carriers, "[s]treamlined regulatory treatment of non-dominant carriers 'does not relieve non-dominant carriers from complying with Sections 201-205 of the Act, but merely modifies the method by which the Commission assures compliance with these requirements.'"[38] In a permissive detariffing context, carriers would be relieved from complying with Section 203. Absent a statutory mandate to file and not deviate from tariffs, it is far from clear that tariffs would continue to carry the same legal weight.

If tariffs do not have the "force of law," they may well not relieve carriers of the administrative burdens they would face in a world without tariffs. For example, tariffs without legal weight might not provide constructive notice to customers and prospective customers of rates and terms and conditions of service and changes therein. Moreover, a carrier might not be able to exercise the statutory right to file tariff revisions to alter extended term service arrangements simply by revising a tariff which did not constitute "the law" between customers and carriers. And provisions limiting the liability of carriers might not be enforceable against

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[37] 47 U.S.C. § 203.

[38] Richman Bros. Records, Inc. v. U.S. Sprint Communications Co., Inc., 10 FCC Rcd. 13639, ¶ 17 (1995).

users, such as "casual callers," who do not have a preexisting relationship with the carrier or to any greater extent than in a normal commercial environment.

Finally, as noted earlier, permissively-filed tariffs would not perform a meaningful informational function for consumers; indeed, they could serve as a vehicle for providing disinformation. In a permissive detariffing regime, carriers could pick and chose what rates they will publish. Such selectively-filed tariffs could be used to send false pricing signals to consumers, suggesting to the less well informed that more favorably priced options were unavailable, while providing preferred customers with access to unpublished rates. Putting aside discrimination against resale carriers, the major providers currently maintain ranges of price points for small business users, providing those who are more well informed or which have been fortunate enough to have been approached by a competitor with substantially better rates than those who are unaware of available alternatives. It is not uncommon for the price differentials to exceed 100 percent, with less fortunate small business users paying more than twice what similarly-situated, but better informed, small business users are paying. Tariffs obviously do not solve the problem, but they do make it easier for users to obtain accurate pricing information.

In short, permissive detariffing (or for that matter, even mandatory tariffing without a requirement that the largest carriers and those affiliated with incumbent LECs file detailed rate schedules) will adversely impact smaller users (commercial and residential), both directly, by depriving them of a meaningful informational source for telecommunications service and pricing options, and indirectly, by discriminatorily denying price points and service offerings to the resale carriers that would bring rates and service offerings to lower volume users that the largest carriers would prefer to reserve to their major customers. The Commission has repeatedly accommodated the needs of large corporate users, authorizing carriers to provide such major

traffic generators with such customer specific service offerings as Virtual Telecommunication Network Service and Contract Tariffs. It is time for the Commission to focus on the needs of small business and residential customers and to ensure that the benefits of competition are available to all.

C. The Commission Should Declare Unlawful, And Bar The Filing Of, Tariff Revisions Which Modify, Without "Grandfathering," Existing Long-Term Service Arrangements

While TRA is not supportive of efforts by the large user community to bar tariffs in the hope that detariffing might permit major corporate users to eke out additional price concessions from the largest carriers, it is sympathetic to concerns voiced by large corporate users with regard to the ability of carriers to unilaterally alter the terms of long-term service arrangements simply by filing tariff revisions.[39] As noted above, TRA's resale carrier members are large customers, as well as aggressive competitors, of their underlying network providers. Hence, TRA's resale carrier members are also vulnerable to unilateral changes in the rates they pay for, and the terms and conditions pursuant to which they take, network services; indeed, resale carriers may be more vulnerable because they may have made commitments to their customers to deliver service at certain rates and pursuant to the terms and conditions to which they agreed with their network providers.

The solution to this problem, however, is not mandatory detariffing of all services or of customer-specific offerings. Such an approach may represent a viable solution for those entities with the economic clout to strike workable service arrangements with carriers even in the absence of published rates and Commission enforcement of non-discrimination requirements, but,

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[39] *See, e.g.,* Comments of the Ad Hoc, UTC and the "Broadcast Interests.

as discussed above, detariffing of any kind adversely impacts all other users. The better approach is to prevent carriers from utilizing tariff filings to unilaterally alter long-term service arrangements to the detriment of existing customers.

In its comments, TRA recommended that the Commission achieve this end by strengthening the "substantial cause" test to prohibit unilateral changes in long-term service arrangements in all but the most extreme circumstances and, in those extreme circumstances, to afford customers of long-term service arrangements which have been unilaterally altered a "fresh-look" opportunity to terminate the arrangement without liability. Consistent with this recommendation, TRA also urged the Commission to apply the Mobile-Sierra doctrine to all carrier-to-carrier service arrangements irrespective of the form or context in which such arrangements are embodied and in so doing to prohibit unilateral modification of carrier-to-carrier arrangements, including arrangements between resale carriers and their network providers, through tariff revisions.

To address the concerns voiced by the large corporate users, TRA would expand its previous recommendations to incorporate the proposal that the Commission declare unjust and unreasonable and hence, unlawful and unenforceable any tariff revision which effects a unilateral modification to an existing long-term service arrangement. Under this expanded approach, carriers would be permitted to modify their extended-term service offerings only so long as they "grandfathered" all existing customers, including those that had ordered, but not yet received, service, for the full term of their current service arrangements. Carriers would likewise be allowed to modify rates if a service arrangement were structured so that the customer was only guaranteed a set discount off rates that it was aware could be increased from time to time, but the carrier would not be allowed to reserve to itself the right to make other changes in terms or

conditions of service. And of course, a carrier would be permitted to alter the terms of an existing long-term service arrangement with the acquiescence of all current customers thereto. In other words, carriers would be required to deal with customers as suppliers do in the normal commercial world.

This is not to suggest that a carrier could not petition the Commission for a waiver of this requirement, but it could not effect the desired changes unless and until the Commission expressly authorized it to do so. The standard for granting any such waivers should be exceedingly high. Commercial impracticability, frustration of purpose and impossibility of performance would all appear to be appropriate tests,[40] as would a showing of no adverse impact on existing customers. And even if such a waiver were granted on commercial impossibility grounds, the carrier should be required to afford its existing customers a "fresh-look" opportunity to terminate their service arrangements without liability.

As the U.S. Supreme Court has noted, "the filed rate doctrine . . . contains an important caveat;" a revised rate, term or condition is enforceable only if it is not unjust or unreasonable and hence unlawful.[41] The Commission can reasonably determine that as a general rule, any tariff revision that unilaterally alters the terms and conditions of an existing long-term service arrangement is unjust and unreasonable and hence unlawful. Indeed, if the Commission so chose, it could do so simply by extending the reach of the Mobile-Sierra doctrine to cover all contract-like carrier service arrangements. As the U.S. Court of Appeals for the District of

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[40] *See* 18 S. Williston & W. Jaeger, Williston on Contracts (3d ed. 1978) at 1, et seq.; Restatement (Second) of Contracts (1979) §§ 261, et seq.

[41] Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 at 130 (*citing* Louisville & Nashville R. Co. v. Maxwell, 237 U.S. 94, 97 (1915); Keough v. Chicago & Northwestern R. Co., 260 U.S. 156, 163 (1922)).

Columbia Circuit has recognized, the Mobile-Sierra doctrine "restricts federal agencies from permitting regulatees to unilaterally abrogate their private contracts by filing tariffs altering the terms of those contracts."[42]

III.

CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to adopt rules and policies in this docket consistent with these second-phase reply comments and its earlier filed comments and reply comments.

Respectfully submitted,

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[42] MCI Telecommunications Corp. v. FCC, 665 F.2d 1300, 1302 (D.C. Cir. 1981).